for The Defense

Volume 7, Issue 1 ~ ~ JANUARY 1997

The Training Newsletter for the Maricopa County Public Defender's Office ⋈ Dean Trebesch, Maricopa County Public Defender

CONTENTS:

Guilty Except Insane	Page 1
Impeachment With Substantive Evidence	Page 3
The Easiest Court Appearance Anyone Will Ever Make	Page 5
Profiles-Who's Who in the Public Defender's Office	Page 6
Computer Corner	Page 7
Bulletin Board	Page 7
Arizona Advance Reports Volume 230-232	Page 8
Jury Trials	Page 11

GUILTY EXCEPT INSANE

By Rebecca S. Potter
Deputy Public Defender

It was difficult enough under the old law to decide whether or not to use the insanity defense. Now the guilty except insane option only makes things tougher. The issues we most often face as defense attorneys when thinking about guilty except insane are: when should I use this defense, how do I use this defense, and what happens to the defendant if I "win"?

Excluded Conditions

Arizona Revised Statutes §§ 13-502 and 503 list several conditions that will not be considered mental defects or disorders. Therefore, it is crucial to be aware of all of the excluding conditions when deciding whether or not to assert the insanity defense.

When considering the use of guilty except insane as an affirmative defense, do not overlook the fact that disorders resulting from the use of alcohol and/or drugs are not considered mental diseases or defects. Conditions occurring while withdrawing from drugs or alcohol, also are not considered mental diseases or defects. In spite of these exemptions, you may still have a basis for the defense if the defendant has a defect or disorder due to past usage, but was not using or withdrawing from drugs or alcohol at the time of the offense.

Threshold Determinations

After deciding whether or not to assert the defense of guilty except insane, the next question is, how do I do it? A.R.S. § 13-502 states that a mental defect or disease constituting legal insanity is an affirmative defense. Obviously, this means that the state must be given notice of the defense. However, giving notice of the defense does not necessarily mean that you will be permitted to assert it.

In cases involving death, serious physical injury or the threat of death or serious physical injury, the court must make a threshold determination that there is a reasonable basis for the defense. See A.R.S. § 13-502 (B). In determining whether there is a reasonable basis for the defense, the court can order the defendant to be sent to a secured state, county, or other secured licensed mental health facility, for evaluation for a period of up to thirty days. If the court does not order the defendant into a mental health facility, the court must appoint its own expert to evaluate the defendant. The defendant will be

(cont. on pg. 2) ☞

required to pay for his or her stay and evaluation in the mental health facility or for an evaluation done by the court appointed expert, unless the defendant is found to be unable to pay. In practice, many courts do not seem to be making a threshold determination concerning a defendant's ability to pay, but the statute clearly requires it.

Guilty Pleas

Perhaps even more troubling is the practice by some courts in allowing a defendant to enter a plea of guilty except insane. The statute does not make an allowance for this type of plea. Guilty except insane, by statute, has been defined as an affirmative defense, not as a type of plea. *There is no mechanism by which a defendant can enter a "guilty except insane" plea.*

The statute requires a finding by the trier of fact regarding the issue of insanity, and the defendant must prove legal insanity by clear and convincing evidence. See A.R.S. 13-502 & (D). However, the defendant can waive a jury trial and submit the issue of insanity to the judge.

There is no mechanism by which a defendant can enter a "guilty except insane" plea. The statute requires a finding by the trier of fact regarding the issue of insanity.

Defendant's Consent

Another issue to consider, when deciding to use the insanity defense, is whether or not defense counsel needs the express consent of the defendant. This issue has not been visited by the courts with regard to the new statute but the court has muddied the waters in regard to not guilty by reason of insanity. In *State of Arizona v. Hurles*, 214 Ariz. Adv. Rep. 33, 914 P.d. 1291 (Ariz. 1996), the Arizona Supreme Court held that the express consent of a defendant to use the insanity defense is not required. Additionally, before the court would consider a claim by the defendant that his 14th Amendment rights had been violated by the use of an insanity defense, the defendant would need to make an express objection on the record to the use of the defense.

Since the court in *State v.Hurles* held that insanity is a defense, not a plea, it would seem unlikely that the court would hold that the defendant has the right to control the decision of whether or not to use the insanity defense. However, the court did not expressly decide the issue of whether or not a defendant has a right to prevent his or her counsel from using the insanity defense.

The reasoning in *State v. Hurles* should be applicable to the new statute. As in the old law, the new statute defines guilty but insane as an affirmative defense and requires clear and convincing evidence of insanity by the defendant. The fact that a finding of insanity would result in a finding of guilty, should not result in a change of the court's reasoning because the state is still required to prove its case beyond a reasonable doubt just as it was under the old law. In other words, the finder of fact could find the defendant not guilty altogether.

The *Hurles* decision is also important because it holds that the burden of proof is not improperly shifted to the defendant by requiring the defendant to prove his or her insanity by clear and convincing evidence. This holding should also apply to the new law since this requirement was not changed in any way by the new legislation.

Treatment; Non-Dangerous/Dangerous

Guilty except insane does change the way a defendant is treated if found insane at the time of the offense. The new law divides cases into two categories. The results for the defendant are vastly different depending on which type of case applies to the defendant. In making a decision on whether or not to use the insanity defense, counsel should consider what will happen if they win.

Every person found guilty but insane must be committed to a secure mental health facility for treatment. However, what happens after the initial commitment is wholly dependent on whether or not the defendant was convicted of a dangerous or a non-dangerous offense.

(cont. on pg. 3)☞

for The Defense Copyright©1996

Editor: Russ Born

Assistant Editors: Jim Haas
Ellen Kirschbaum
Sherry Pape

Office: 11 West Jefferson, Suite 5
Phoenix, Arizona 85003
(602) 506-8200

for The Defense is the monthly training newsletter published by the Maricopa County Public Defender's Office, Dean Trebesch, Public Defender. ***for The Defense*** is published for the use of public defenders to convey information to enhance representation of our clients. Any opinions expressed are those of the authors and not necessarily representative of the Maricopa County Public Defender's Office. Articles and training information are welcome and must be submitted to the editor by the 10th of each month.

If the defendant was convicted of a non-dangerous offense, then the provisions of A.R.S. §13-3994(B)&(C) apply. The defendant must be given a hearing within seventy-five days of commitment to determine if he or she is entitled to release. If the defendant proves by clear and convincing evidence that he or she does not suffer from a mental defect or disorder, the court must release him or her and the defendant is no longer committed pursuant to A.R.S. §13-502 (D). If the court finds that the person suffers from a mental defect or disease and may be a danger to self or others, then the county attorney must institute civil commitment proceedings. Even if civilly committed, the defendant is not committed pursuant to A.R.S. § 13-502 (D). This means that the defendant is not under the supervision of the Psychiatric Review Board.

The picture is much more grim for those found guilty except insane of a dangerous offense. Dangerous offenses are governed by A.R.S. §13-3994 (D) et. seq. A defendant found guilty except insane of a dangerous offense is placed under the jurisdiction of the Psychiatric Review Board for the presumptive sentence which the defendant would have received if not for the finding of insanity. In the case of murder in the first degree the defendant is under the Board's jurisdiction for life.

The defendant is not entitled to a hearing regarding release from hospitalization for the first 120 days but cannot be held longer than two years without a hearing. At the hearing, the defendant must prove by clear and convincing evidence that he or she is no longer suffering from a mental disease or defect or is not dangerous, in order to be released from hospitalization.

If the Board finds that the defendant is no longer suffering from a mental disease or defect, it must release the defendant. Even though the defendant no longer suffers from a mental illness, he or she still remains under the jurisdiction of the Psychiatric Review Board for the presumptive term. If the Board finds that the defendant does still suffer from a mental disease or disorder but is no longer dangerous, then the Board must release the defendant on a conditional release with a supervised treatment plan in place. The defendant remains under the supervision of the Board for the presumptive term.

If the Board finds that the defendant is dangerous and suffering from a mental disease and disorder, it must keep the person hospitalized. The defendant under these circumstances cannot get a new release hearing for another six months.

As of November 19, 1996, thirty four individuals have been placed under the jurisdiction of the Psychiatric Review Board. Of those thirty four persons, one has been released because his sentence has expired; five have been conditionally released and twenty nine remain in the Arizona State Hospital. Of the five conditionally released, none were released before completing six months of hospitalization. In addition, of the five persons conditionally released, two were re-hospitalized. No one was unconditionally released.

Persons found guilty except insane of a dangerous offense must be hospitalized in a licensed and secure health care facility. In practice, this has meant the Arizona State Hospital. The defendant's freedom is severely limited and even if released, he or she is not free from scrutiny until after the presumptive term has expired. Therefore, guilty except insane may not always be the best choice for a defendant charged with a dangerous offense.

Representation

Lastly, the Court of Appeals, Division 1 held in *Coconino County Public Defender v. Adams* 184 Ariz. 273, 908 P.d. 489 (Ariz.Ct.App. 1995), that the public defender cannot be appointed to represent defendants in hearings before the Psychiatric Review Board. Therefore, once the defendant is found to be under the Board's jurisdiction, denfendant will not have the benefit of court-appointed counsel to help them get released. This is certainly another important point to consider when deciding whether or not to assert the defense, particularly when one considers the current statistics as to how many persons have actually been released.

Conclusion

It is apparent that those found guilty except insane of a non-dangerous offense are treated much differently than those found guilty except insane of a dangerous offense. After considering all of the repercussions of a finding of guilty except insane, many defendants may not wish to use this defense. ■

IMPEACHMENT WITH SUBSTANTIVE EVIDENCE

By James H. Kemper
Deputy Public Defender

Suppose you had a trial in which all the eye-witnesses told the jury your client didn't do it. Your Rule 20 motion would be granted and your client would go home, right? Well, not necessarily. It might be true if the witnesses had always said your client didn't do it; but if they made statements, outside the courtroom, that he did do it and recanted the statements during their in-court testimony, then you may not be saved by what they tell the

(cont. on pg. 4)☞

jury. What they said before the trial, even though not under oath, and not subject to cross-examination at the time, may carry the day for the state. How can this be?

The reason is simple. Ever since *State v. Skinner*, 110 Ariz. 135, 515 P.2d 880 (1973) prior inconsistent statements have constituted substantive evidence in this state. What this means is that a prior inconsistent statement may be used to impeach the witness who made it, and also to prove the facts recited in the prior statement. In other words, the state can make a prima facie case using only out-of-court statements. The prior statements may enable the state to survive a Rule 20 motion. They may even support a guilty verdict. I have in fact just worked on such a case, inherited from my friend Mr. Hruby, who did a first-rate job. By virtue of the fact I have the case you know Mike lost, some of it; but he won a lot more than he lost. Unfortunately for Mike's client, prior inconsistent statements rescued the state.

Upon first thought a prior statement, though inconsistent, might seem in this context to meet the timeless, pre-Rules of Evidence definition of hearsay; it is made out of court, it was not subject to cross-examination at the time of its making, and after *Skinner* it is offered for the truth of its content. However, Rule 801(d)(1)(A) of the Arizona Rules of Evidence provides that such inconsistent statements are NOT hearsay. Rule 613(b) provides that the prior inconsistent statement may be shown by extrinsic evidence, after the witness has been asked the "warning question." In plain English this means that after the witness says your client didn't do it the prosecutor may ask her if she told officer Jones your client did do it. When she says no, or doesn't remember, or equivocates in any way, you can bet you are going to see officer Jones very soon.

Are prior statements, assuming they are relevant, always admissible by virtue of their inconsistency alone? The answer is no, but it is not an answer that will give you much.

In *State v, Cruz*, 128 Ariz. 538, 627 P.2d 689 (1981) the defendant was convicted of second degree murder for shooting another boy in a parking lot at Carl Hayden High School. Earlier in the day the shooting victim had punched Mr. Cruz out during a dispute about automobile vandalism and theft, so there was a genuine issue about how long Mr. Cruz had contemplated shooting the victim. In this connection the prosecutor called the defendant's sister to the stand to ask whether, on the morning of the shooting, she had made certain statements to the victim's girlfriend, statements about her brother's intent to shoot the victim. The sister denied making the prior statements.

Then the girlfriend of the departed was called, and of course she told the jury what she claimed the sister had told her earlier that morning, about the defendant's intention to shoot the victim. The statements were strongly incriminatory. They were prior, they were inconsistent, and on the basis of *Skinner* they were substantive evidence of Cruz' guilt. The Supreme Court reversed because of the girlfriend's testimony. In doing so it said,

> Even though an out-of-court statement may be used to cast doubt on a witness' credibility, when it contains the dual purpose of tending to prove a defendant's guilt, it should not be admitted. *Cruz*, 128 Ariz. at 540, 627 P.2d at 691.

This is simple enough, a bright-line rule, something we can all understand.

At this point it is useful to observe that appellate courts, when they are performing their common-law function, appear to go through a two stage process, at least in criminal cases. In stage one they boldly pronounce just such a rule as I have described, one that is simple and easy to understand. This pronouncement is usually dressed up with a lot of blather about the fundamental and enduring values of a free society etc. *Miranda v. Arizona*[1] is a stage one case. So is *Terry v. Ohio*.[2] *Batson v. Kentucky*[3] is proving to be a paradigm of the species. *Cruz* was another.

Then, metaphorically speaking, the particular court appears to wake up in the middle of the night in a cold sweat, thinking what have we done? They appear to realize almost at once that some defendant might actually win a case because of this clear and simple rule they have promulgated. Thus begins stage two, in which the original clear and simple rule is so hedged about with exceptions and qualifications that it is at first obfuscated, then rendered meaningless. Only after the court which issued the stage one case issues its first stage two case can lesser appellate courts themselves pounce upon the soon-to-be-carcass of the original shining pronouncement. But pounce they will.

Then, metaphorically speaking, the court appears to wake up in the middle of the night in a cold sweat, thinking "what have we done?"

The first stage two case in this tale is *State v. Allred*, 134 Ariz. 274, 655 P.2d 1326 (1982), decided a year and a half after *Cruz*. *Allred* is actually two cases, tried together and appealed together. One is that of the husband, convicted of molesting his own four-year-old daughter and sent to the penitentiary; the other is that of the wife, convicted of hindering prosecution and placed on probation. Although each case involved the same principle, the Supreme Court reversed one conviction, and

(cont. on pg. 5)☞

affirmed the other. Would you care to guess which one was affirmed? The one for molestation? How did you know? There were two witnesses being impeached in *Allred*, the victim and her seven-year-old half-sister. The prior inconsistent statements were presented through a county (Gila) attorney investigator and a psychologist. Before the court could affirm the molestation conviction it had to deal with *Cruz*.

It began by saying that the language quoted above "was not the holding in *Cruz*," though clearly it was.[4] Then it said "[we do not repudiate *Cruz*," although it proceeded to do just that.[5] Finally the court said that it had "become obvious that some of our language in *Cruz* is subject to diverse interpretations."[6] It is anybody's guess what this means. After all this build up the court said that there were really five factors to be considered in deciding whether it was error to admit a prior inconsistent statement containing evidence of guilt. These factors were (1) whether the witness being impeached denies having made the prior statement, (2) whether the witness presenting the impeaching statement has an interest in the proceeding and there is no other corroboration that the statement was made, (3) there are other factors affecting the reliability of the impeaching witness, such as age or mental capacity, (4) the true purpose of the offer is substantive use of the statement rather than impeachment of the witness, and (5) the impeachment testimony is the only evidence of guilt. The court cited no source for these five factors so one can only assume the court pulled them out of the jurisprudential hat. But having considered them the court then reached the result already described.

Since *Allred* there have been seven reported decisions[7] in which the impeachment with substantive evidence issue made an appearance. The only defendant in these cases who succeeded on the *Allred* point was a Mr. Thomas, and it appears that the Supreme Court was going to reverse his conviction anyway. It is, I suspect, more than a coincidence that Mr. Thomas' case was close to the beginning of the stage two cycle.

Conclusion

Cruz and *Allred* are not much, as you can see. But they are something every defense lawyer should know about. Who knows? Maybe someday you will have a case where you can keep out a prior inconsistent statement that is the only evidence your client is guilty.

1. 384 U.S. 436 (1966).
2. 392 U.S. 1 (1968).
3. 476 U.S. 79 (1986).
4. *Allred*, 134 Ariz. at 276, 655 p.2d at 1328.
5. *Allred*, 134 Ariz. at 277, 655 p.2d at 1329.
6. Id.
7. *State v. Nevarez*, 178 Ariz. 525, 875 P. 2d 184 (App. 1994); *State v. Petzoldt*, 172 Ariz. 272, 836 P. 2d 982 (App.1992); *State v. Hernandez*, 170 Ariz. 301, 823 P. 2d 1309 (App. 1992); *State v. Anaya*, 165 Ariz. 535, 799 P.2d 876 (App. 1990); *State v. Moran*, 151 Ariz. 378, 728 P.2d 248 (1986); *State v. Beck*, 151 Ariz. 130, 726 P. 2d 227 (App. 1986); *State v. Thomas*, 148 Ariz. 225, 714 P.2d 395 (1986). ■

THE EASIEST COURT APPEARANCE ANYONE WILL EVER MAKE

By Nora Greer
Deputy Public Defender

In Maricopa County, a not guilty arraignment is the easiest court appearance your client will ever attend. However, they must show up in one form or another. Not guilty arraignments are held every morning at 8:30 a.m. in Courtroom 501, Central Court Building, 201 West Jefferson. In-custody clients appear over the closed-circuit video system from the jail. You can appear for an in-custody client either at the jail or in Courtroom 501. If you want to appear at the jail court, enter the jail at the transportation driveway off of 1st Avenue. You should go down the ramp to the back of the garage and go to the blue locked door and push the button. The deputies will let you in for the court appearance if you have some ID. If you have a special request for one of your clients that you want me to handle, please let me know before arraignments start. The arraignments for out-of-custody clients are held after the interpreter, in-custody and private counsel cases.

The only time arraignments are not conducted in 501 is when they are covered by TV stations. Judge Reinstein conducts those arraignments in his courtroom. Lawyers will be notified by court administration when these special arraignments are supposed to happen.

The biggest problem with arraignments usually occurs when out-of-custody clients miss their court date. Clients who miss their first arraignment date will get an automatic continuance. The lawyer should get a minute entry from the court and a note from me informing you of both the failure to appear and the new court date. Your job is to contact your client and get him into court. If the client does not show up again, a bench warrant will issue.

How can you avoid a bench warrant? The client either needs a good excuse or a waiver of appearance. Good excuses can be hospitalization or travel allowed by the court. Bad excuses are funerals, family problems and vague illnesses. A second continuance can be obtained if I know about it ahead of time. The commissioners will often grant another continuance if the lawyer knows where

(cont. on pg. 6)☞

the client is and can show a valid reason for their absence. However, if you and your client do a waiver of appearance prior to court, the client does not have to come to arraignment at all.

Rule 14.2 of the Az. Rules of Criminal Procedure describes how to waive a person's appearance at a not guilty arraignment. The attorney must file a written waiver of his client's appearance at least two days prior to arraignment. The document should include a written waiver from the client in which he acknowledges that he wants to waive his appearance; he understands he must appear for all future court dates; and if he fails to appear a bench warrant will issue and he could be tried without being present in court. This client waiver must be notarized and be attached to the motion. The attorney can include a blank order for the judge.

This motion must be followed by another motion and affidavit within 20 days of the waived not guilty arraignment. This motion must show that the client has received his new court dates and understands he must appear.

The waiver procedure is not difficult. I find it strange that it is not used by more attorneys in this office. If your client has job or other problems that may prevent him from coming to court, a waiver can work. All you need is a client willing to maintain contact , the correct CR number from Criminal Court Administration and a short motion.

What happens if in spite of all your best efforts the client fails to appear and a waiver is not possible? The court issues a bench warrant. All of the commissioners now doing not guilty arraignments (Arriola, Lewis and Chavez) will quash a bench warrant if presented with a good reason in a written motion. Do not send a client with a bench warrant to either not guilty arraignments or the commissioner's office without a motion and expect the warrant to be quashed. The commissioners require a written motion. A proposed order should be attached. The warrant will often be quashed and a new court date set by court administration. The commissioner's judicial assistant will give you the new court date. You must notify the client and they must appear for the new date or another warrant will issue which the lawyer will not be able to quash.

If a person is picked up on a warrant , a bond will be set at the new not guilty arraignment. The commissioners will usually set a bond. They have released people OR when the charge is a Class 5 or less or they have a good i.e. verifiable, reason for missing court.

Arraignments are not a big part of most trial attorney's practices. But all clients have to go to them. Showing up for an arraignment can mean the difference between staying in or out of jail while the case is being decided. To save yourself from filing fruitless motions to release, make sure your client shows up in person or by waiver at his arraignment. ■

PROFILES-WHO'S WHO IN THE PUBLIC DEFENDER'S OFFICE

By Ellen Kirschbaum
Training Administrator

This legislative session, there's a new "presence" in the hallways of the State Capital and it belongs to the Maricopa County Public Defender's Office. The face and voice behind that presence is Margot Wuebbels a.k.a. Meg. Until January 13, you would have found Meg practicing in Trial Group A but she was recently selected for the new "legislative liaison" position. We all know that bills are passed without the lawmakers hearing all the ramifications. So, it makes sense that the Public Defender's Office keeps its eyes and ears open to legislative activity.

Since Meg's new office is located on the tenth floor, I knew I had my next victim for *Profiles*. A willing victim, no! A good sport, yes! I enjoyed meeting this spirited redhead whose been mistaken for Sarah Ferguson and mostly recently Agent Dana Scully of the X-Files.

Meg is a local native. She and her three siblings were born and raised in Phoenix. Her Mom and Dad, both originally from Illinois, met in St. Louis and moved to Phoenix to attend graduate school at Arizona State. Her mom works as a nurse and her dad an engineer. Meg has two sisters, one's a teacher in Tucson and the other works for the Governor's Office in New York. Her brother is a sophomore at the American University in Washington D.C.

Meg graduated from Xavier High School with an academic scholarship to Southern Methodist University in Dallas, Texas. There, she set her goals on medicine. When I asked her what diverted her direction, she quickly responded "chemistry." I understood completely. She graduated from SMU with a double major in History and Psychology. After graduation, Meg took off a year to find her "niche." She went to Washington D.C. and landed a job that introduced her to the world of "lobbying" in the agricultural industry. The lobbying job led Meg to pursuing a career in law. This led her back to Arizona to attend University of Arizona Law School. After law school, a stint as a law clerk for the US Senate Judiciary Committee in Washington D.C. led to full time employment as Assistant Counsel.

(cont. on pg. 7)☞

Meg loves to travel and she doesn't miss a chance to go. When I asked where her travels have taken her, she replied, "wherever my friends are." Obviously, Meg has formed a great base of friends because they spread to New Zealand, Canada, Central America and Mexico. I was sorry I asked about her '97 travel schedule. Just about every weekend will be spent in varying US cities. She's even finding time to fit in a trip to Russia. When she's not traveling, Meg likes to read, hike and bike. She lives with three other roommates and her yellow Labrador, "Casey." Meg was quick to tell me that Casey has a "breakout" problem and likes to roam. Thus, Meg is back in school again, only this time with Casey.

The Legislature is in session and Meg is keeping busy tracking new bills. Despite the long hours, she says "it's the best of both worlds..lobbying and law." ■

Computer Corner

By Susie Tapia & Gene Parker
Information Technologies-Help Desk

Keyboard Templates:

Now available from the Help Desk are WordPerfect keyboard templates. Stop by and pick up one or call us at x6198. The Help Desk is located on the 1st floor, Suite 11 in the Luhrs building.

Training: *Still trying to show that computer who's boss?*

Contact the Help Desk to register for either a computer class in the training room or for a one-on-one session. Class sizes are limited to six, register early!

VAX Short Cut Keys

The Help Desk has created a short four page instruction sheet to help you find your way around the VAX/Inquiry System, if you would like the complete copy please contact the Help Desk at x6198. Shown below, you will find the short cut keys to using the VAX.

Quick Keys	Function / Purpose
F1	Select Menu options. Press F1 then first letter of menu item.
F2 or Ctrl+F6	View the selected case.
F4	Exit the system.
Enter	After typing the client's name.
Ctrl + F7	Return to Case Inquiry Entry screen.
Space Bar	Highlight a case - Case Selection Screen.
Page Up / Down	Scroll through clients names.
Arrow Keys	Used to highlight either the type of case (Both, Open, Close) or to scroll through clients in the Case Selection Screen.

FLIP-ITS

Beginning this month the Help Desk is introducing **FLIP-ITS-Fundamental Learning Is Powerful -- Information Technologies Shortcuts**. These information sheets are available at the Help Desk. They contain short cuts, helpful hints, new ideas or alternative methods to completing your daily tasks on the computer. Pick this months' up and place them in your purple computer manual to use for future reference. Each month a new topic of interest will be covered. This months' FLIP-ITS features are:VAX shortcuts, User Hints and How to Print and Save attached files in GroupWise. ■

BULLETIN BOARD

♦ *Attorneys-Moves/Changes*

Michael Gerity, formerly assigned to Group A, accepted a position in private practice.

Rob Reinhardt, an attorney in Group C, resigned from the office this month to pursue a new employment opportunity.

♦ *New Support Staff*

Monique Kirtley, recently joined the office as a part-time Law Clerk in Group C. Monique is a JD candidate currently attending Arizona State University Law School.

Melany Lyon is an Office Aide for Group C.

Angelina Medina began work this month as an Office Aide in Group D.

Also joining the office as an Office Aide in Group A, is **LaMonte Powers**.

Robert Rosette, a recent graduate from the Law School at Arizona State University has been hired as a part-time Law Clerk in Group C.

Lynda Turner, who resigned from the office last October, has returned as a Legal Secretary in Group C.

(Cont. on pg. 8)☞

♦ *Moves/Changes*

Lucia Herrera was promoted to Lead Secretary in Appeals.

Gilbert Arevalo, an Office Aide in Group D, resigned from the office on 12/31/96.

Judy Segerstron, a former Legal Secretary in Group C passed the Bar and accepted a position in private practice.

Jason Leonard has been hired part-time to assist Jeff Reeves at the Juvenile Southeast location. ■

ARIZONA ADVANCE REPORTS

A summary of criminal defense issues in Volumes 230-232

By Steve Collins
Deputy Public Defender

***State v. Soto-Fong*, 230 Ariz. Adv. Rep. 7 (Supreme Court 11/19/96)**

An informant gave testimony against defendant to avoid prison. He stated two other men admitted the murder and said the third man involved was Cha-Chi. There was no hearsay exception. However, once defendant introduced part of the statement, the state had the right to bring out the entire statement. This is because Arizona follows the wide open "English" rule that cross-examination extends to all matters covered by direct examination. Evidence that a third person threatened the alleged victim was inadmissible. "The rule is that threats by a third person against a victim may not be shown unless coupled with other evidence having an inherent tendency to connect such other person with the actual commission of the crime."

***State v. McCrimmon*, 230 Ariz. Adv. Rep. 3 (Supreme Court 11/19/96)**

It was error for the trial judge to continue to poll the remaining jurors after one juror failed to affirm the verdict. This had a coercive effect similar to inquiring into the numerical division of a deadlocked jury. It was further error to tell the juror she would have to decide if she agreed with the guilty verdict. The judge should have explained to her that inability to find guilt beyond a reasonable doubt should be considered as a disaffirmation of the verdict. Jury coercion is fundamental error.

***State v. Jones*, 230 Ariz. Adv. Rep. 24 (Div. 1, 11/19/96)**

It was prosecutorial misconduct to state in closing argument that defendant's wife thought defendant was capable of committing the charged crimes. It was vouching as there was no evidence admitted at trial to support the claim. It was proper for a police officer to testify as to the contents of a police report to rebut a claim of recent fabrication. However, it was error to give the dates for the alleged offenses because the complaining witness did not testify as to the dates. It was held to be harmless error, because the "date of the offense is not an element of sexual assault" and the indictment is automatically deemed amended to conform to the evidence when there is no prejudice to defendant. Three juvenile witnesses ignored subpoenas and failed to show up for the first day of trial. The trial judge had the witnesses arrested and placed in custody for one week until they finished testifying against defendant. The judge failed to comply with the requirements for securing the testimony of material witnesses under A.R.S. Sections 13-4081 through 13-4084. Three days was the maximum detention allowed. However, it was held one week in custody was not so coercive that it affected the juveniles' testimony. DISSENT: The detention of the juveniles was unduly coercive. The prosecutor's statement that defendant's wife felt he could have committed the crimes was also unduly prejudicial.

***State v. Cordovana*, 230 Ariz. Adv. Rep. 34 (Div. 1, 11/19/96)**

Defendant's DUI trial was delayed for 27 months. This was a denial of his speedy trial rights under Arizona Criminal Procedure Rule 8. However, it was error to dismiss the case "with prejudice." A claim of diminished memory of witnesses was insufficient to prove prejudice.

***State v. Arizona Department of Corrections (Tarango)*, 231 Ariz. Adv. Rep. 9 (Supreme Court 12/5/96)**

A.R.S. Section 13-3408 requires a "flat time" prison sentence for a drug offense under that statute. However, when prior felony convictions are alleged, A.R.S. Section 13-604 controls and defendant is eligible for parole. This also applies to sex offenses. *State v. Tarango*, 214 Ariz. Adv. Rep. 38 (Supreme Court 4/16/96) The Arizona Supreme Court found Tarango did not change the meaning of Section 13-604, but simply construed the meaning it always had. Therefore, Tarango is not limited to prospective application. The Department of Corrections was ordered to reclassify the parole eligibility of all inmates sentenced under Section 13-604. (cont. on pg. 9) ☞

State v. Geotis, **231 Ariz. Adv. Rep. 35 (Div. 1 12/12/96)**

After a traffic stop, defendant was arrested for an outstanding warrant. Three pounds of marijuana and $922 in cash were found in his vehicle. The cash was civilly forfeited prior to defendant's criminal trial. It was held defendant was not subjected to double jeopardy because civil forfeiture in Arizona is not punishment. Failure to raise a double jeopardy claim in the trial court does not necessarily result in a waiver of that issue. Also, the double jeopardy clauses under the Arizona state constitution and the Fifth Amendment are construed the same. Miranda rights apply when a defendant is confronted with physical evidence of a crime. It amounts to the functional equivalent of interrogation. It was proper to give an accomplice instruction because defendant said the marijuana belonged to the owner of the vehicle. This permitted an inference defendant was assisting someone else. The fact the police did not keep a pager; a water pistol painted to simulate a handgun; or the cash, did not entitle defendant to a Willits instruction on the destruction of property. The items were not rendered inaccessible to defendant. It was prosecutorial misconduct to tell jury that defendant was unconcerned about the seizure of the cash, because he could always sell more drugs. It was a comment on defendant's character prohibited by Arizona Evidence Rule 404. Similarly, it would be improper for a prosecutor to argue a defendant had a predisposition to commit a crime. Here it was held to be harmless error.

State v. State of Arizona (Kankelfritz), **230 Ariz. Adv. Rep. 58 (Div. 1 11/26/96)**

A.R.S. Section 28-692 indicates a violation when there is a blood alcohol content of 0.10% within two hours of driving. Relation back testimony may be used. The blood alcohol test does not have to be given within two hours of driving.

State v. Geffre, **231 Ariz. Adv. Rep. 11 (Div. 1 11/29/96)**

Under A.R.S. Section 13-1303, a conviction for unlawful imprisonment has to be reduced from a class 6 felony to a class 1 misdemeanor when the victim is released without physical injury. Here, defendant knocked the victim's teeth out, but this occurred prior to the victim being restrained. "A defendant's release of the victim is voluntary unless substantial evidence demonstrates that it resulted from the victim's escape or from an actual rescue by police or another third party."

State v. Solano, **231 Ariz. Rep. 27 (Div. 1 12/10/96)**

Police were called to the scene of an altercation between defendant and two women. It was proper to make a "Terry" investigatory stop. However, it became an illegal arrest when defendant was transported to the scene of a prior shooting one-half mile away and was not released for two hours. The factors in determining if a detention exceeds a permissible "Terry" stop include the proximity between the location of the crime an the scene of the stop; the amount of time between the crime and the stop; and the duration of the stop. Here, "standing alone, the transportation of defendant to the crime scene for interrogation transformed the initial detention into an arrest without probable cause." A confession obtained after an illegal arrest may be admissible. "Three factors bear upon this question: 1. the time elapsing between the illegality and the acquisition of the evidence; 2. the presence of intervening circumstances; and 3. the purpose and flagrancy of the original official misconduct." Here, there was no intervening circumstance to purge the taint of the illegal arrest, but it was held to be harmless error. Another Criminal Procedure Rule 19.1(a) specifies instructions are to follow closing arguments. However, the rule provides the parties may agree to have closing arguments follow the instructions. If they do, the reasonable doubt instruction does not have to be given again after closing arguments.

State v. Jimenez, **232 Ariz. Adv. Rep. 33 (Div. 1 12/24/96)**

Shortly after sentencing, defendant filed a motion to modify the terms of his probation. After the motion was denied, he sought review by direct appeal. It was held he may seek review only pursuant to Rule 32. The Court of Appeals noted, "if the trial court's order had actually changed or modified the judgment or sentence originally imposed, we assume defendant would have had the right of direct appeal." "To be appealable, a post-judgement order must raise issues different from those that could have arisen from an appeal from an underlying judgment.

State v. Thornton, **232 Ariz. Rep. 3 (Supreme Court 12/12/96)**

A.R.S. Section 21-211(1) states a witness in the action shall be disqualified to serve as a juror. Here, a prospective juror had listened on a police scanner to the police conversations when defendant was captured. The juror was not a witness under Section 21-211(1) because the facts she had heard were not in dispute. If the information heard by the juror had been material and disputed, it would have required a reversal if the judge denied a challenge for cause. This would be true even if a peremptory challenge was used to exclude the prospective juror from the panel. "If confronted with a challenge for cause in which the facts do not clearly establish whether a prospective juror should be removed, the better practice will be to resolve doubt in favor of disqualification." Defendant used an insanity defense.

(cont. on pg. 10) ☞

An order requiring him to disclose all mental health experts who had evaluated him did not violate his right against self-incrimination under the Fifth Amendment. Defendant argued his mental health was a mitigating factor in this death penalty case. He had the "burden of proving by a preponderance of the evidence that his capacity to appreciate the wrongfulness of his conduct or to conform his conduct to the requirements of law was significantly impaired, but not so impaired as to constitute a defense to prosecution."

***State v. Gonzalez-Gutierrez*, 231 Ariz. Adv. Rep 6 (Supreme Court)**

A border patrol agent made an "investigatory stop" of defendant's vehicle. The agent testified he stopped the vehicle because defendant glanced at the agent's marked vehicle; the passenger slouched in his seat, perhaps pretending to be asleep; the vehicle was proceeding at the same speed as the rest of traffic; it was during rush hour; defendant moved slightly onto the right shoulder as the agent followed him; and both occupants of the vehicle were Hispanic. The agent testified this behavior was typical of illegal aliens. He also testified he had subjective reasons because when his vehicle approached defendant's vehicle, defendant scratched his head, then quit scratching his head and gripped the steering wheel firmly. Further, neither occupant looked at the agent when he looked at them. The Arizona Supreme Court held the reasons given were insufficient to justify the stop. An "investigatory stop" of a vehicle is less intrusive than an arrest and does not require probable cause. However, the "totality of the circumstances" must still provide "a particularized and objective basis for suspecting the particular person stopped of criminal activity." Although subjective elements may be considered, there must also be objective "evidentiary indicators."

***State v. Portis*, 232 Ariz. Adv. Rep. 35 (Div. 1 12/24/96)**

The state sought to revoke defendant's probation for providing a urine sample containing traces of cocaine. At the violation hearing, the probation officer was the only witness. Her only knowledge of the "dirty urine" sample came from an intake coordinator for the program which did the urinalysis. The intake coordinator had not supervised the defendant's urinalysis. The director of the program which did the urinalysis, testified he talked to an employee who said one of his assistants had collected the urine sample. However, the employee did not know which assistant and could not rule out an assistant who was a recovering drug addict and had been fired for having a dirty urine sample. It was held this double hearsay was unreliable. Therefore, the state failed to establish a sufficient chain of custody between the test results and the sample allegedly taken from defendant.

***State v. Scott*, 232 Ariz. Adv. Rep. 30 (Div. 1 12/24/96)**

At trial, defense counsel did not object to several off-the-record bench conferences. The conferences were reconstructed on the record when counsel deemed it important. The Court of Appeals stated it disapproves of "the failure to make a contemporaneous record of a bench conference," but found it was not fundamental error. The expert testified the substance was marijuana. The jury did not have to be told A.R.S. Section 13-3401 provides, "marijuana does not include the mature stalks of such plant or the sterilized seed of such plant which is incapable of germination."

***State v. Sproule*, 232 Ariz. Adv. Rep. 19 (Div 1 12/18/96)**

Defendant was found guilty of first degree murder. It was not an abuse of discretion to sentence defendant to natural life rather than life with the possibility of parole in 25 years. The trial judge did not have to state specific reasons for the sentences. ■

CRIMINAL JURY INSTRUCTIONS

***Editor's Note*:**

Recently, as part of a continuing effort by the Arizona State Bar to update and revise criminal jury instructions, the Criminal Jury Instruction Committee was formed. This committee is made up of members from the Judiciary, the Attorney General's Office, the Federal Defender's Office, the Maricopa County Attorney's Office and Public Defender's Office.

The Committee's purpose is not be do a wholesale revision of the instructions, but to address particular issues that arise due to changes in the law, along with clarification of existing instructions.

The Maricopa County Public Defender's Office has two members on the committee, Daniel Carrion and Karen Clark. Dan is the sub-committee chair for the "lesser included" instruction and Karen Clark is a member of the "reasonable doubt" sub-committee. If you have comments on existing instructions or suggestions for new ones, give them a call. Dan can be reached at (602) 506-2805. Karen can be reached at (602) 506-6194. Dan and Karen will be happy to hear from you! ■

DECEMBER, 1996
Jury & Bench Trials

Group A

Dates: Start/Finish	Attorney/ Investigator	Judge	Prosecutor	CR# and Charge(s) Class F/M	Result (w/ hung jury, # of votes for not guilty / guilty)	Bench / Jury Trial
11/13-12/4	Shelley Davis and Barry Handler/ Jones	de Leon	Ditsworth	CR95-06358 Murder 1 (Death Penalty) F1	Not Guilty	Jury
11/18-12-24	James Cleary (Advisory Counsel)	Yarnell	Heilman	CR95-02477 Kidnapping, F2 Aggravated Assault, F4 Attempted Sex Abuse, F6 Theft, F3	Guilty	Jury
11/25-12/4	Rick Tosto/ Jones	Gerst	Roberts	CR96-08730 Attempted Sex Assault, F3 Sex Abuse, F5 Kidnap, F2	Not Guilty - Sex Abuse Hung - Attempted Sex Assault/Kidnap (5 not guilty 3 guilty)	Jury
12/2-12/5	Tom Timmer	Arriola	Astrowski	CR94-07688 Forgery, F4	Guilty	Jury
12/10-12/13	Jerry Hernandez	Mangum	Sorrentino	CR96-03919 Forgery, F4	Guilty	Jury
12/12-12/16	Rick Tosto	Mangum	Sorrentino	CR96-07390 Aggravated Assault, F3	Guilty Aggravated Assault (non-dangerous)	Jury
12/16-12/19	Jerry Hernandez	Bolton	Roberts	CR96-01957 Child Molest, F2 (DCAC)	Not Guilty	Jury
12/18-12/19	Kristen Curry	Hall	Sultan	CR96-06721 Aggravated DUI, F4	Guilty	Jury

Group B

Dates: Start/Finish	Attorney/ Investigator	Judge	Prosecutor	CR# and Charge(s) Class F/M	Result (w/ hung jury, # of votes for not guilty / guilty)	Bench / Jury Trial
11/25/96 to 12/13/96	Joel Brown/Mark Siegel	Wilkinson	Garcia	CR95-03442 First Degree Murder, F1 Child Abuse, F1	Guilty	Jury
12/9/96 to 12/16/96	Charles Vogel	Topf	Kuffner	CR96-08291 Burglary, F4	Not Guilty	Jury
12/16/96 to 12/18/96	Jim Park	McDougall	Stooks-Ewing	CR96-06895 Burglary, F3	Guilty of Residential Trespass	Jury
12/9/96 to 12/12/96	Dan Sheperd	Geirst	Bernstein	CR96-04735 Agg. Asslt., F3 Int.Jud.Proc., Msd.	Guilty Guilty	Jury Jury

Group C

Dates: Start/ Finish	Attorney/ Investigator	Judge	Prosecutor	CR# and Charge(s) Class F/M	Result (w/ hung jury, # of votes for not guilty / guilty)	Bench /Jury Trial
12/2-12/5	James Lachemann	Hendrix	Alt	96-91625 Agg Aslt, F6	Guilty	Jury
12/4-12/10	Anthony Bingham/ Luke Clesceri	Hendrix	Maxwell	92-93329 1 ct. Agg DUI, F5 1 ct. Agg Dr. w/BA < .05, F5	Guilty	Jury
12/11-12/13	Wesley Peterson	Hendrix	Brenneman	96-92005 Agg Aslt, F5	Not Guilty	Jury
12/16-12/16	James Leonard Tim Mackey	Araneta	Stelly	96-91232 Agg DUI, F4 Agg Dr. w/BA < .05, F4	Guilty	Jury

Group D

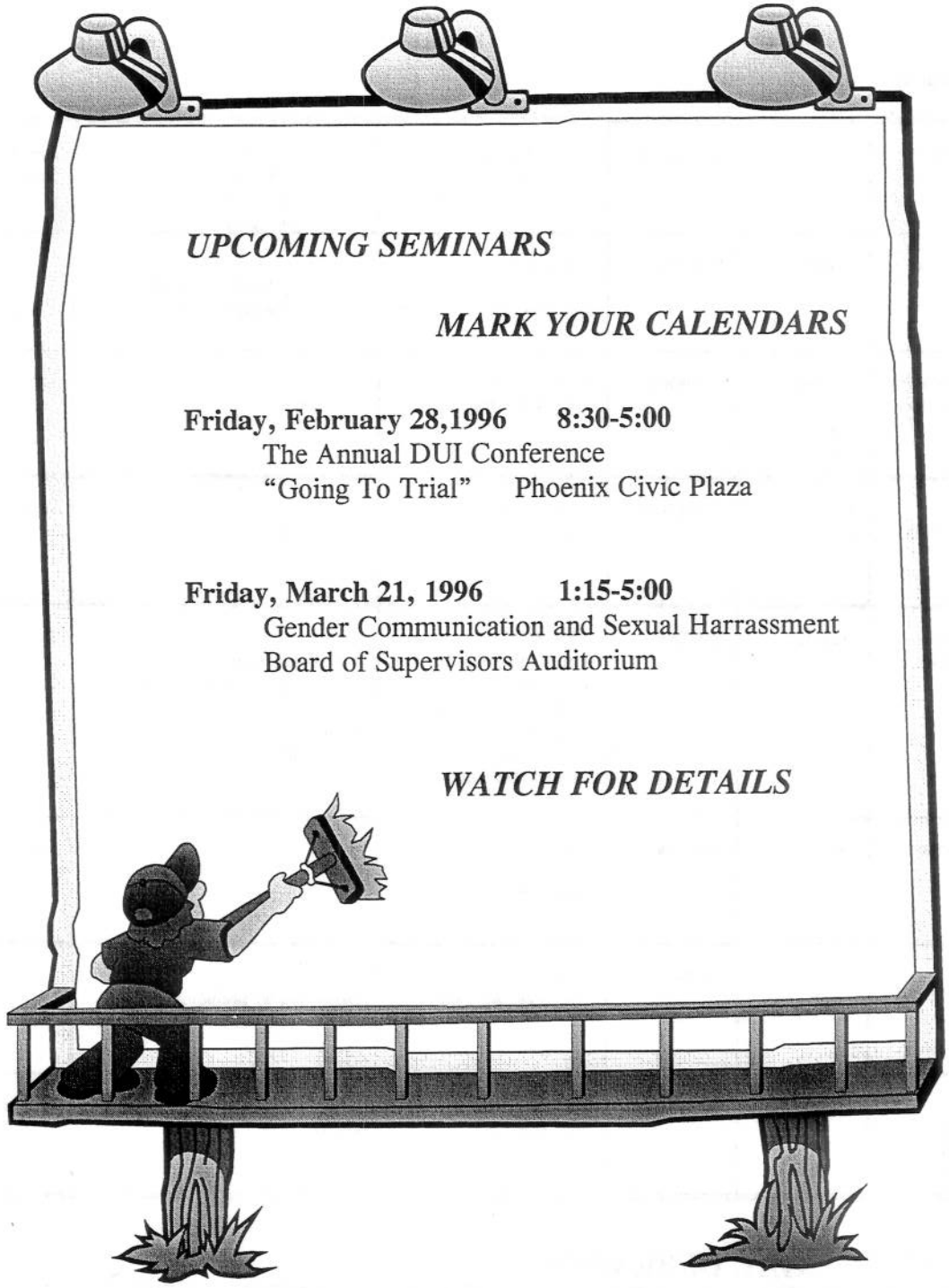
Dates: Start/ Finish	Attorney/ Investigator	Judge	Prosecutor	CR# and Charge(s) Class F/M	Result (w/ hung jury, # of votes for not guilty / guilty)	Bench / Jury Trial
10/28-10/31	Bob Jung	Mangum	Kramer	CR96-06975 2 cts. DUI F4	Guilty 1 ct. DUI Dismissed 1 ct. DUI	Jury
11/20-12/03	Curtis Beckman Jeremy Mussman R. Barwick D. Erb	Rogers	Shutts	CR93-09611 1 ct. Agg. Aslt. F3	Not Guilty (With 2 prior hung juries)	Jury
11/21-12/04	Jerald Schreck/ Jennifer Wilmott/	Hilliard	Gialketsis	CR96-01250 1 ct. Agg.Aslt F6 CR96-02841 1 ct. Sell Meth F2	Mistrial	Jury
11/25-12/4	Phil Vavalides/ Margarita Silva	Nastro	Barrett	CR96-02967 1 ct. Arm. Rob. F3	Not Guilty	Jury
12/02-12/05	Gary Bevilacqua/ Carole Larsen/ R. Barwick S. Bradley	Grounds	Johnson,A	CR95-10795 1 ct. Armed Rob. F2 CR95-12875 1 ct. Armed Rob. F2 CR96-07372 1 ct. Armed Rob.F2 1 ct. Kidnap F2 1 ct. Agg. Aslt F2	Not Guilty Dismissed by C.A. Dismissed by C.A.	Jury

(Group D continued)

Dates: Start/ Finish	Attorney/ Investigator	Judge	Prosecutor	CR# and Charge(s) Class F/M	Result (w/ hung jury, # of votes for not guilty / guilty)	Bench / Jury Trial
12/04-12/06	Nancy Hines	Dougherty	Schumacher	CR96-01940 1 ct. Unlawful Flight F5 1 ct. Resisting Arrest F6	Not Guilty Unlawful Flight Guilty Resisting Arrest	
12/09-12/09	Margarita Silva/ Dee Nickerson	McBeth E#1 Justice Court	Johnson,R.	TR96-12229 1 ct. DUI Mis.	Not Guilty	Jury
12/09-12/12	Jennifer Willmott/Phil Vavalides	deLeon	Vercauteren	CR96-05992 1 ct. Theft F3	Guilty of F5	Jury
12/12-12/18	Robert Billar/ Kim O'Connor	Rogers	Skibba	CR95-02177 1 ct. Kidnapping F2 1 ct. Armed Rob. F2 3 cts. Aggravated F3 Assault 1 ct. Conspiracy to Commit Extortion F2	Not Guilty (Kidnap) Guilty (non-dangersous) (A.R.) Not Guilty 1 ct. (A.A.) Guilty 2 cts. (A.A.) Not Guilty (C.C.E.)	Jury
12/12-12/17	Jeanne Steiner	Gerst	Schlittner	CR 95-02640 3 cts. Sale of Narcotic Drugs F3	Guilty	Jury
12/16-12/17	Nancy Hines	Skiff	Droban	CR95-11114 1 ct. Agg. Ass. F3	Dismissed w/ prejudice	
12.16-12/18	Richard Zielinski/ Donna Elm/ Sid Bradley	Nastro	Barrett	CR96-07368 1 ct. Agg. Aslt. F5	Guilty	Bench

OFFICE OF THE LEGAL DEFENDER

Dates: Start/Finish	Attorney/ Investigator	Judge	Prosecutor	CR# and Charge(s) Class F/M	Result (w/ hung jury, # of votes for not guilty / guilty)	Bench / Jury Trial
12/2-12/5	Roland Steinle/Soto	Araneta	O'Neill	CR95-91846 Child Molest F2	Not guilty	Jury



UPCOMING SEMINARS

MARK YOUR CALENDARS

Friday, February 28,1996 8:30-5:00
The Annual DUI Conference
"Going To Trial" Phoenix Civic Plaza

Friday, March 21, 1996 1:15-5:00
Gender Communication and Sexual Harrassment
Board of Supervisors Auditorium

WATCH FOR DETAILS